

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 DONTE McCLELLON, an individual

CASE NO. C18-0909-JCC

11 Plaintiff,

ORDER

12 v.

13 CAPITAL ONE BANK N.A.,

14 Defendant.

15 This matter comes before the Court on Plaintiff's motion to vacate order pursuant to
16 Federal Rule of Civil Procedure 60(b), to reopen the case, and for recusal (Dkt. No. 41).¹ Having
17 thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument
18 unnecessary and hereby DENIES the motion for the reasons explained herein.

19 **I. BACKGROUND**

20 On November 27, 2018, the Court dismissed Plaintiff's claims with prejudice and entered
21 judgment dismissing Plaintiff's complaint. (Dkt. Nos. 20, 21.) On January 22, 2019, Plaintiff
22 moved to vacate the judgment and for leave to amend his complaint, which the Court denied.
23 (Dkt. Nos. 22, 24.) Plaintiff subsequently filed a motion for reconsideration, which the Court
24 also denied. (Dkt. Nos. 25, 27.)

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26 ¹ Plaintiff does not offer substantive argument in support of his request that his case be
reopened. (*See generally* Dkt. No. 41.)

1 Plaintiff appealed the Court’s orders on his motion to vacate and his motion for
2 reconsideration, along with the Court’s judgment dismissing his complaint. (Dkt. No. 31.)
3 Plaintiff moved for leave to appeal *in forma pauperis* (“IFP”). (Dkt. No. 30.) The report and
4 recommendation (“R&R”) of the Honorable Brian A. Tsuchida, United States Magistrate Judge,
5 recommended that Plaintiff’s request be denied, finding that Plaintiff’s appeal was not taken in
6 good faith. (*See* Dkt. No. 36.) Objections to the R&R were due by April 26, 2019. (*Id.*)
7 Plaintiff’s objections were filed with the Court on April 29, 2019 although they were postmarked
8 on April 26. (Dkt. No. 39.) On April 30, 2019, the Court adopted the R&R and denied Plaintiff’s
9 request to appeal IFP. (Dkt. No. 37.) Plaintiff now moves to vacate the Court’s order adopting
10 the R&R, to reopen his case, and for recusal. (Dkt. No. 41.)

11 **II. DISCUSSION**

12 **A. Motion to Vacate**

13 Plaintiff contends that he inadvertently filed his objections to the R&R after the deadline
14 had passed, as he was not in Washington between April 12 and April 30, relied on a family
15 member to send his objections to the R&R, and in his experience court filings are treated as
16 timely when postmarked by the filing deadline under the United States tax code. (*See id.* at 1.) A
17 court may relieve a party from an order for “mistake, inadvertence, surprise, or excusable
18 neglect.” Fed. R. Civ. P. 60(b)(1). The Court finds that Plaintiff’s alleged inadvertence in failing
19 to timely file his objections to the R&R does not merit vacation of the Court’s order adopting the
20 R&R pursuant to Federal Rule of Civil Procedure 60(b)(1).

21 Plaintiff also argues that vacation of the Court’s order is merited under Federal Rule of
22 Civil Procedure 60(b)(3). (Dkt. No. 41 at 2–4.) A court may relieve a party from an order for
23 “fraud . . . , misrepresentation, or misconduct by an opposing party.” Fed. R. Civ. P. 60(b)(3).
24 Plaintiff alleges that he “believes that the Honroable Brian A. Tsuhida, Chief Magistrate Judge,
25 is doing something improper” and that “it is the belief of the Pro Se Plaintiff that the Honorable
26 Brian A. Tsuchida, Chief U.S. Magistrate Judge **in connection with** Defendant Capital One

1 Bank's counsels' non-motion response and declaration . . . is misrepresenting Pro Se Plaintiff's
2 IFP filing(s) and Complaint(s) in an erroneous and exaggerated matter [sic] and is not presenting
3 it in a proper context as both were filed." (Dkt. No. 41 at 2–3) (emphasis in original). Plaintiff's
4 speculative allegations of fraud or misrepresentation by Judge Tsuchida and Defendant are
5 insufficient to merit relief under Federal Rule of Civil Procedure 60(b)(3).

6 The remainder of Plaintiff's arguments challenge Judge Tsuchida's evaluation of his IFP
7 application. (See Dkt. No. 41 at 2–4.) The Court construes these arguments as a motion for
8 reconsideration. Motions for reconsideration are generally disfavored. W.D. Wash. Local Civ. R.
9 7(h)(1). Reconsideration is only appropriate where there is "manifest error in the prior ruling or a
10 showing of new facts or legal authority which could not have been brought to [the Court's]
11 attention earlier with reasonable diligence." *Id.* "A motion for reconsideration should not be used
12 to ask the court to rethink what the court had already thought through—rightly or wrongly."

13 *Premier Harvest LLC v. AXIS Surplus Insurance Co.*, No. C17-0784-JCC, Dkt. No. 61 at 1
14 (W.D. Wash. 2017) (quoting *U.S. v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998)).
15 Plaintiff argues that Judge Tsuchida erred in evaluating Plaintiff's present financial status and his
16 responses on the IFP application. (See Dkt. No. 41 at 2–3.) But Plaintiff has not identified a
17 manifest error in the R&R, or presented new facts or legal authority meriting reconsideration.
18 Moreover, Judge Tsuchida's primary conclusion was that Plaintiff's appeal was not taken in
19 good faith—not that Plaintiff failed to allege indigency. (See Dkt. No. 36.)

20 In sum, Plaintiff has not established a ground meriting vacation or reconsideration of the
21 Court's order adopting the R&R and denying his request to proceed IFP on appeal, and his
22 motion is DENIED on this ground.

23 **B. Motion for Recusal**

24 Plaintiff asks the Court to recuse itself from the case pursuant to 28 U.S.C. § 455(a).
25 (Dkt. No. 41 at 4–5.) "Any justice, judge, or magistrate judge of the United States shall
26 disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

1 28 U.S.C. § 455(a). “[A] judge’s prior adverse ruling is not sufficient cause for recusal.” *Taylor*
2 *v. Regents of Univ. of California*, 993 F.2d 710, 712 (9th Cir. 1993) (quoting *United States v.*
3 *Studley*, 783 F.2d 934, 939 (9th Cir. 1986)). Plaintiff asserts that recusal is warranted because the
4 Court has made several adverse rulings against him. However, that is not a valid basis for
5 recusal. *See Taylor*, 993 F.2d at 712. Therefore, Plaintiff’s motion is DENIED on this ground.
6 The Clerk is DIRECTED to refer Plaintiff’s motion for recusal to Chief United States District
7 Judge Ricardo S. Martinez for further consideration. *See* W.D. Wash. Local Civ. R. 3(g).

8 **III. CONCLUSION**

9 For the foregoing reasons, Plaintiff’s motion to vacate order pursuant to Federal Rule of
10 Civil Procedure 60(b), to reopen the case, and for recusal (Dkt. No. 41) is DENIED.

11 DATED this 6th day of June 2019.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE